Petition

81-1229

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ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court of the United States

October Term, 1982

PAXTON NATIONAL INSURANCE COMPANY,
Petitioner

v.

TRANSPORT INDEMNITY COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the "exclusive control and responsibility" provisions of the Interstate Commerce Act and of the Interstate Commerce Commission regulations, governing the leasing and use of equipment by interstate motor carriers, establish an exclusive employer-employee relationship between the regulated lessee-carrier and the driver furnished with the leased vehicle, with respect to the various issues of liability that arise from an accident caused by the driver's alleged negligence during the course of interstate transportation and the term of the equipment augmentation lease subject to the commission's regulation.

II. Whether a court of appeals may substitute its own finding with respect to the employment status of the driver of a leased vehicle when the district court's determination rests upon evidence and is consistent with controlling federal and common law doctrines.

PARTIES

Petitioner Paxton National Insurance Company was the defendant in the district court and the appellee in the court of appeals. Respondent Transport Indemnity Company was the plaintiff in the district court and the appellant in the court of appeals. There have been and are no other parties to this case.

Petitioner Paxton National Insurance Company is a wholly owned subsidiary of Dauphin Management Corporation and is an affiliate of Remco Insurance Company.

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REPORTS OF OPINIONS

The memorandum opinion of the district court and the opinion of the court of appeals have not been reported. The complete text of these opinions is set forth in the appendix to this petition.

JURISDICTION

The judgment and opinion of the court of appeals are dated and were entered on August 31, 1981. A timely petition for rehearing was denied by an order dated and entered on October 5, 1981. A copy of the order denying the petition for rehearing is included in the appendix to this petition. Jurisdiction to review the judgment in question is conferred upon this Honorable Court by 28 U. S. C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 204(e) of the Interstate Commerce Act, 49 U. S. C. § 304(e) provides:

> "(e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—
>
> (1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that

during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment."

These provisions were substantially re-enacted by the Act of October 17, 1978, 92 Stat. 1337, 1466 and appear now at 49 U. S. C. § 11107(a):

"(a) Except as provided in section 11101(c) of this title, the Interstate Commerce Commission may require a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title that uses motor vehicles not owned by it to transport property under an arrangement with another party to—

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and obtain liability and cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary of Transportation on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier."

Chapter X, Part 1057 of the Interstate Commerce Commission regulations pertaining to the augmenting or leasing of vehicles by a regulated motor carrier, 49 C. F. R. § 1057.1 et seq., are set forth in the appendix to this petition. The provision given the most prominence in this litigation is stated in § 1057.4(a)(4), which requires that the lease

"Shall provide for the exclusive possession, control, and use of the equipment, and for complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement . . ."

This provision has been carried forward in § 1057.12(d)(i) of the revised regulations, which states:

"The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease."

STATEMENT OF THE CASE

Respondent Transport Indemnity Company (Transport) commenced this declaratory judgment action against petitioner Paxton National Insurance Company (Paxton) in the United States District Court for the Northern District of Mississippi (Eastern Division) (No. EC-79-235-LS-0) to determine the parties' responsibilities under their respective insurance policies in connection with an accident that occurred on October 24, 1978, in Tupelo, Mississippi, when a tractor-trailer, owned by Edwin D. Watts (Watts), driven by John W. Weibley (Weibley), and leased to Chem Haulers, Inc. (Chem Haulers) for the transportation of cargo under Chem Haulers' bill of lading in interstate commerce, collided with a pickup truck driven by James L. Nichols (Nichols). Jurisdiction of the district court was established under 28 U. S. C. § 1332: Transport was incorporated by and has its principal place of business in the State of California; Paxton was incorporated by and has its principal place of business in the Commonwealth of Pennsylvania; the amount in controversy, excluding interest and costs, exceeds the sum of $10,000.

At the time of the accident, Chem Haulers was a motor carrier certificated by the Interstate Commerce Commission and authorized to transport the type of cargo which was then aboard the tractor-trailer. On the other hand, Watts had no such certificate or authority. Chem Haulers was the named insured on an "Occupational Comprehensive Liability and Comprehensive Physical Damage" policy issued by Transport, an insurer of carriers like Chem Haulers in many of the continental United States. Watts was a named insured on a "Basic Automobile Liability and Physical Damage" policy issued by Paxton, an insurer of certificated carriers and of truckmen like Watts

in a number of the states. The driver of the tractor-trailer, Weibley, was not a named insured on either policy, and the controversy between Transport and Paxton centered upon coverage for the driver Weibley and the order of liability between the two insurers.

Asserting that its policy did not contain an omnibus clause and that Chem Haulers was its only named insured, Transport claimed that its policy did not cover the driver Weibley. Transport also claimed that the driver was an employee of Watts at the time of the accident, and asserted that, as such, he was covered by Paxton's omnibus permissive user clause. Transport contended further that the indemnification clause in the Chem Haulers-Watts lease, the common law principles of indemnification and subrogation, and its policy's "other insurance" clause rendered Paxton's coverage primary for the driver and its own coverage secondary for Chem Haulers. On the other hand, Paxton asserted that the driver was neither a permissive user nor an employee of its named insured at the time of the accident by virtue of the I. C. C. regulations governing the lease; that its policy provided no coverage for contractual liability or while its insured's vehicle was not being used exclusively in Watts' business and over a route that Watts was authorized to serve; that the driver Weibley was an insured under Transport's policy as one "to whom insurance coverage has been extended under the policy or made so by provision of law" in light of the insurance policy's I. C. C. endorsement [B. M. C. 90] and the Commission's regulations; that Transport's "other insurance" clause was negated by its I. C. C. endorsement; and that Transport alone provided coverage for the accident in question.

The parties agreed that the Commission's regulations governing the leasing of equipment by motor carriers applied to and were incorporated in the "Trip Lease & Man-

ifest" between Chem Haulers and Watts; [1] that the tractor-trailer involved in the accident was then under exclusive lease to Chem Haulers and was transporting property exclusively for Chem Haulers, under Chem Haulers' bill of lading and over an interstate route which Chem Haulers was authorized by the Commission to serve; and that the vehicle was transporting no property for Watts, who held no authorization or certificate from the I. C. C. to transport the cargo then aboard the vehicle. At a bench trial, the driver Weibley testified that while he had Watts' authority to lease the tractor-trailer, himself and his co-driver to the employment of Chem Haulers under the I. C. C. regulations, he had no authority or intention to obligate Watts to indemnify Chem Haulers; that he received an advancement of expense money, placards and instructions from Chem Haulers; and that the bill of lading identified the truck driver as an employee of Chem Haulers.

The district court held that there was no coverage under Paxton's policy by virtue of its endorsement A330 [2]

1. Thus, the lease, which stated that ". . . the Lessor further agrees to operate said equipment as directed by Lessee", was deemed to include the provisions required by 49 C. F. R. § 1057, including the provision "for the exclusive possession, control, and use of the equipment, and complete assumption of responsibility in respect thereto, by the lessee for the duration" of the lease.

2. "(b) Except with respect to the named insured or an employee thereof, but subject otherwise to the 'Persons Insured' provision, the insurance does not cover as an insured any person or organization, or any agent or employee thereof, engaged in the business of transporting property by automobile for the named insured or for others under any of the following conditions:

(1) if the bodily injury or property damage occurs while such automobile is not being used exclusively in the business of the named insured and over a route the named insured is authorized to serve by federal or public authority. . .".

and its exclusion (a);[3] that Transport provided coverage by virtue of its I. C. C. endorsement even if its policy contained no omnibus clause; and that liability, if any, on account of the accident in question was the exclusive and sole responsibility of Chem Haulers and Transport. The district court then entered an order which declared that Transport had exclusive coverage for the accident, and later an order denying Transport's request for reconsideration. (A copy of these orders are appended to this petition.)

While it found that the driver was an insured under Transport's policy and that, therefore, Transport's argument for secondary liability under indemnity and subrogation principles did not obtain, the court of appeals rejected the district court's decision with respect to Paxton and ultimately held that Paxton furnished the primary coverage and defense obligations for the underlying accident.[4] Reaffirming its rejection in *Carolina Casualty Insurance Co. v. Underwriters Insurance Co.*, 569 F. 2d 304, 312 (5 Cir. 1978), of the Tenth Circuit[5] rule implicitly adopted by the district court that "under 49 C. F. R. 1057, Chem Haulers became exclusively and solely liable for the vehicle as fully and effectively as if it owned the vehicle and the driver and this becomes Transport's ex-

3. "This insurance does not apply

(a) to liability assumed by the insured under any contract or agreement . . .".

The district court found it unnecessary to decide whether the indemnity provisions in the lease were binding upon Watts.

4. While the appeal was pending, the injured party brought suit in the same district court against Chem Haulers, Weibley and Watts. That action is still pending at No. 81-144-LS-P.

5. *See, Argonaut Ins. Co. v. National Indemnity Co.*, 435 F. 2d 718 (10 Cir. 1971), and *Hagans v. Glen Falls Ins. Co.*, 465 F. 2d 1249 (10 Cir. 1972).

clusive liability under form BMC 90", the court of appeals chose to give effect to Transport's "other insurance" clause, rendering its coverage excess, regardless of any indemnity clause in the lease. With respect to Paxton's endorsement A330, and the district court's holding that the accident was Chem Haulers' and Transport's exclusive responsibility, the court of appeals held that the driver was Watts' employee at the time of the accident, and that "While it is true that Weibley [the driver] was also a statutory employee of Chem-Haulers under 49 C. F. R. 1057, *Simmons v. King*, [478 F. 2d 857 (5 Cir. 1973)], Paxton's repeated argument that Weibley was an employee of Chem-Haulers *alone*, and that he operated without Watts' permission blinks reality." Later, the court of appeals denied Paxton's timely petition for rehearing.

Following the mandate of the court of appeals on remand, the district court entered an order which declared that Paxton had primary coverage and the duty to defend Chem Haulers, Weibley and Watts, and that Transport had excess coverage only as to Chem Haulers and Weibley. A copy of this order is appended to this petition.

ARGUMENT

The language of the Act and the regulations, vesting exclusive possession, control, use and responsibility for the operation of leased equipment in the lessee, is clear. Also, there has been virtually no change to the "borrowed servant" rule authoritatively addressed by this Honorable Court in *Standard Oil Co. v. Anderson*, 212 U. S. 215, 221-222, 29 S. Ct. 252, 53 L. Ed. 480 (1909):

> ". . . The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it.
>
> It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are, for the time, his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for

> the ultimate benefit of the other, it is still, in its doing, his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed,— a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking."

Yet, while the various federal and state courts which have adjudicated personal-injury-based claims arising from accidents such as the one in question uniformly recognize that the regulations create a "statutory" employment relationship between the lessee-carrier and the borrowed driver of the leased and exclusively controlled vehicle, once the focus of the courts departs ever so slightly from "the public" and the lessee's liability to that amorphous class, those courts take divergent, conflicting and irreconcilably confusing paths.

The instant and past decisions of the Fifth Circuit demonstrate this variety. In *Simmons v. King*, 478 F. 2d 857, 867 (5 Cir. 1973), the court recognized that the regulations made the driver the statutory employee of the lessee as a matter of federal law, but held that those regulations do not determine the employment relationship between the driver and the owner-lessor. In *Allstate Ins. Co. v. Alterman Transport Lines, Inc.*, 465 F. 2d 710 (5 Cir. 1972), the court held that the owner's insurer did not cover the accident and could be indemnified by the lessee when the owner regarded the driver furnished to the lessee to be an independent contractor, but in *Carolina Cas. Ins. Co. v. Underwriters Ins. Co.*, 569 F. 2d 304 (5 Cir.

1978), the court declined to follow the Tenth Circuit, as mentioned above, and held that the Commission's regulations and forms were not determinative beyond the interests of the injured public and that the driver could be regarded as an employee of the lessor. Further confusion was injected by the court in *White v. Excalibur Ins. Co.*, 599 F. 2d 50 (5 Cir. 1979), when the court chose not to follow the Fourth Circuit's decision in *Proctor v. Colonial Refrigerated Trans. Co.*, 494 F. 2d 89 (4 Cir. 1974), and held that the injured driver was not a member of the public and that his sole remedy against the lessee and his insurer was for workmen's compensation benefits.

Turning to the other circuits which have addressed these issues, one finds that: the Third Circuit does not regard the regulations determinative beyond the lessee's liability to the injured public, would not regard a holding that the driver was a servant of both the lessor and the lessee as inconsistent with a finding that the driver was engaged exclusively in the business of the lessee, and requires a tri-partite analysis of federal law, state law, and private contracts to adjudicate the issues including the employment status of the driver. *Allstate Ins. Co. v. Liberty Mutual Ins. Co.*, 368 F. 2d 121 (3 Cir. 1966), *Walter v. Dunlap*, 368 F. 2d 118 (3 Cir. 1966), *Carolina Cas. Ins. Co. v. Ins. Co. of N. America*, 595 F. 2d 128 (3 Cir. 1979); the Fourth Circuit, as noted above, permits a co-driver to sue the lessee, *Proctor, supra*, but would affirm a finding of dual employment, *Vance Trucking Co. v. Casual Ins. Co.*, 395 F. 2d 391 (4 Cir. 1968); the Seventh Circuit appears to accept the finding that the driver is the lessor's employee, *Continental Cas. Co. v. American Fidelity & Cas. Co.*, 275 F. 2d 381 (7 Cir. 1960), *Pacific Intermountain Express Co. v. Liberty Mutual Ins. Co.*, 359 F. 2d 735 (7 Cir. 1966); the Eighth Circuit finds that the regulations rendered the driver a statutory employee but not an employee for insurance purposes, and

unlike the Fifth Circuit in the instant case and the Tenth Circuit as noted, finds no obligation to cover the driver, *Wellman v. Liberty Mutual Ins. Co.*, 496 F. 2d 131 (8 Cir. 1974). We have found no cases from the other circuits that indicate what effect, if any, they might give to the regulations when confronted with an issue other than the lessee's liability to an injured person.

Among the states, the control and responsibility clause required by the regulations has been held by some courts as creating a relationship between the lessee and the leased vehicle and driver which is determinative not only of the lessee's vicarious liability to the injured public, but also of: the lessor's vicarious liability to the public, *Hopfer v. Staudt*, 298 P. 2d 186 (Ore. 1956), and to the lessee, *American Fidelity & Cas. Co. v. Johnson*, 336 S. W. 2d 351 (Ky. 1960), *Barsh Truck Lines, Inc. v. Jerry Lipps, Inc.*, 424 S. W. 2d 81 (Mo. App. 1968), *Schindle v. Ulrich*, 268 N. W. 2d 547, 552 (Minn. 1978); the lessee's workmen's compensation liability to the injured driver, *American Red Ball Transit Co. v. Industrial Comm.*, 359 P. 2d 1018 (Col. 1961), *Farmer v. Ryder Truck Lines, Inc.*, 266 S. E. 2d 922 (Ga. 1980), *Hartford Acc. and Indem. Co. v. Major*, 226 N. E. 2d 74 (Ill. App. 1964); and the priority of liability insurance coverages, *Burton v. Diamond Sand and Stone Co.*, 327 So. 2d 95 (Fla. App. 1976).

On the other hand, other states have deemed the provision as not determinative of the driver's status when liability to the public is not at issue: *Aetna Cas. & Sur. Co. v. Security Ins. Co.*, 267 A. 2d 582 (Del. 1970) (liability inter se of leasing parties and insurers), *Beany v. Paul Arpin Van Lines Co.*, 200 A. 2d 592 (R. I. 1964) (workmen's compensation), *Behner v. Industrial Commission*, 96 N. E. 2d 403 (Oh. App. 1951) (workmen's compensation), *Billings v. Ralph E. Curtis & Son, Inc.*, 400 A. 2d 377 (Me. 1979), *Coleman v. Ringle Truck Lines, Inc.*, 91 N. W. 2d

566 (Iowa 1958), *Industrial Indem. Co. v. McIntosh*, 604 P. 2d 1233 (Mont. 1980) (workmen's compensation), *Julian Martin, Inc. v. Indiana Ref. Lines*, 560 S. W. 2d 228 (Ark. 1978) (workmen's compensation), *Matkins v. Zero Ref. Lines, Inc.*, 602 P. 2d 195 (N. M. App. 1979), *Newland v. Overland Express, Inc.*, 295 N. W. 2d 615 (Minn. 1980) (liability to driver), *Reed v. Industrial Comm.*, 534 P. 2d 1090 (Az. App. 1975) (workmen's compensation), *Ryder Truck Lines, Inc. v. Carolina Cas. Ins. Co.*, 385 N. E. 2d 449 (Ind. 1979) (priority of coverages), *S & N Freight Line, Inc. v. Bundy Truck Lines, Inc.*, 164 S. E. 2d 89 (N. C. App. 1968) (liability between leasing parties), *Transport Indemn. Co. v. Teter*, 575 S. W. 2d 780 (Mo. App. 1978) (coverage for driver), *Truck Ins. Exchange v. Transport Indemnity Co.*, 591 P. 2d 198 (Mont. 1979) (priority of coverages).

This Honorable Court has not addressed the central question involved in this case, and the varying and conflicting effects given to the statutory, regulatory and contractual provisions at issue by the state and federal courts necessitate the intervention of this Court as the final arbiter of the national law. Petitioner believes that the vesting of exclusive possession, control and use of Watt's equipment in, and the assumption of complete responsibility for the operation of the equipment by Chem Haulers effectively delimited Watts' relationship with the equipment and its driver, and established an exclusive master-servant relationship between the driver and Chem Haulers. Both statutorily and as a matter of common law, the driver ceased to be Watts' employee in connection with Chem Haulers' transportation, and became Chem Haulers' exclusive employee for the mandated term of the lease. This contention, petitioner respectfully submits, does not "blink reality", but rather plainly recognizes the nature of the relationships which the Act and the regulation create.

Whether that relationship is to be borne out consistently and in fact, or whether that relationship is to be regarded merely as a metaphysical fiction with no basis in reality is a matter most appropriately to be determined by this Honorable Court.

Petitioner believes that this case involves not only a decision plainly in conflict with the Act, the regulations, and the decisions of other courts, but also a decision by a federal appellate court plainly beyond its scope of review. The non-jury determinations of a federal district court may not be set aside or reversed by a court of appeals unless it is found to have been clearly erroneous, F. R. C. P. 52, *United States v. United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948).

The determination of the district court with respect to the coverage provided by Paxton's insurance policy to the driver Weibley at the time of the accident was established upon the evidence submitted by the parties, and was consistent with the federal regulations and with Mississippi law. In *Mitchell v. Eagle Motor Lines*, 87 So. 2d 466 (Miss. 1956), a case relied upon by petitioner in the lower courts, the carrier asserted that the lease's denomination of the driver as the agent or servant of the lessor made the driver of the truck the employee of the lessor and not of the carrier-lessee. The trial court, however, directed a verdict in favor of the lessor, and the Mississippi supreme court affirmed. The court of appeals in the instant case distinguished *Mitchell* by stating, "However a close reading of *Mitchell* reveals that the Mississippi Supreme Court found as a matter of fact that the driver was an operator of the lessee, 87 So. 2d at 467". One finds, however, that the conclusion reached by the state court was based upon a complete construction of the lease, with emphasis upon the vesting of exclusive control in the lessee.

CONCLUSION

For these reasons, petitioner asks that this Honorable Court issue its writ for review of the decision of the court of appeals.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 81-4120
Summary Calendar

TRANSPORT INDEMNITY COMPANY,
Plaintiff-Appellant

v.

PAXTON NATIONAL INSURANCE COMPANY,
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

(AUGUST 31, 1981)

Before CHARLES CLARK, RUBIN and SAM D. JOHNSON, Circuit Judges

PER CURIAM:

Transport Indemnity Company (Transport) sought a declaratory judgment against Paxton National Insurance Company (Paxton) to determine liability for an accident occurring in Tupelo, Mississippi on October 24, 1978. The district court found that Transport was solely and exclusively liable. For the reasons set forth below, we reverse.

On October 24, 1978, Edwin D. Watts, d/b/a Watts Trucking Company of Duncannon, Pennsylvania, agreed to lease his tractor trailer rig and driver to Chem Haulers, Inc., of Florence, Alabama, for a shipment to Syracuse, New York. Watts' driver, John Weibley, presented himself and the truck to an agent of Chem Haulers, signed a trip lease, and departed after placing two placards with Chem Haulers' name and ICC number on each door of the tractor. The truck was involved in a collision with a vehicle driven by James Nichols, who suffered personal injuries and property damage as a result of the accident. At the time of the accident Chem Haulers was the named insured under a policy issued by Transport and Watts was the named insured under a policy issued by Paxton.

I.

The district court thought that Transport contended that the omnibus clause in Paxton's policy covered Chem Haulers as a permissive user. On that basis the court held that endorsement A 330 [1] of Paxton's policy excluded

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1. Endorsement A-330 in Paxton's policy, also known as the "Truckmen's Endorsement" provided:

> (b) Except with respect to the named insured or an employee thereof, but subject otherwise to the "Persons Insured" provision, the insurance does not cover as an insured any person or organization, or any agent or employee thereof, engaged in the business of transporting property by automobile for the named insured or for others under any of the following conditions:
>
> > (1) if the bodily injury or property damage occurs while such automobile is not being used exclusively in the business of the named insured and over a route the named insured is authorized to serve by federal or public authority.

omnibus coverage of Chem Haulers.[2] The district court's premise was incorrect. Transport never contended that Chem Haulers was a permissive user under Paxton's policy but rather, it insisted to the district court and here that Watts' driver Weibley was the permissive user. Since the exclusion of liability under endorsement A 330 excepts "the named insured *or an employee thereof*" it does not affect Weibley. The failure by the district court to recognize that Weibley was an insured under the terms of the Paxton policy was error.

The district court also noted that Paxton's policy provided an exclusion for liability assumed by the insured under any contract or agreement. The trip lease signed by Weibley contained a clause whereby the lessor (Watts) agreed to indemnify the lessee (Chem Haulers) from any and all liability incurred by the use of the leased vehicle. The district court reasoned that Paxton had no liability for what the court thought was a contractual undertaking of its insured's employee. However, the district court's failure to recognize Weibley's status as a Paxton insured caused further error in defining "liability assumed by contract." The liability of Paxton for Weibley's negligence was grounded in the insurance contract between Paxton and Watts. The indemnity clause in the trip lease was immaterial to the coverage provided. The contract exclusion in Paxton's policy did not apply to the accident in question.

II.

Deciding that Paxton is liable under its policy for the accident in question does not determine whether Transport was liable as well, and if so, the order of liability among insurers. The district court found that "under 49

2. The parties stipulated that the truck was not being used over a route that Watts was authorized to serve.

C.F.R. 1057,[3] Chem Haulers became exclusively and solely liable for the vehicle as fully and effectively as if it owned the vehicle and the driver and this becomes Transport's exclusive liability under form BMC 90."[4] This court rejected that rule in Carolina Casualty Insurance Co. v. Underwriter's Insurance Co., 569 F.2d 304, 312 (5th Cir. 1978).

Throughout this litigation Transport has conceded liability. Its contention is that its liability is excess and that Paxton's liability is primary. *Carolina Casualty, supra,* is dispositive on this point. There, as here, the driver of the leased truck was a paid employee of the lessor whose insurance company insured the risk that a permissive user might incur liability. The court stated that

3. 49 C.F.R. § 1057.12(d) (1980) provides:

Written Lease Requirements.

(d) Exclusive possession and responsibilities—

(1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

This regulation was promulgated pursuant to Section 215 of the Interstate Commerce Act, 49 U.S.C. § 315 (1976), recodified at 49 U.S.C. § 10927, which states: ". . . To protect the public, the Commission may require any such motor carrier to file the type of security that a motor carrier is required to file under paragraph (1) of this subsection." Paragraph (1) specifies an insurance policy as a type of security.

4. Form BMC 90 is an endorsement to Transport's policy assuring compliance with the above quoted provisions of the Interstate Commerce Act. By virtue of this endorsement Transport agreed to pay for injuries arising from negligence in the operation of motor vehicles under Chem Haulers' certificate of public convenience and necessity.

"Carolina [lessor's insurer] cannot disavow its primary insurer status on the theory that public policy demands that this be pushed off onto Underwriters [lessee's insurer]. ICC policy factors are frequently determinative where protection of a member of the public or a shipper is at stake, but those factors cannot be invoked by another insurance company which has contracted to insure a specific risk and which needs no equivalent protection". 569 F.2d at 313. As to the lessee's responsibility, we found pursuant to the ICC regulations that the driver was under the lessee's control and thus was a permissive user within the lessee's contract of insurance as well. Applying Georgia law, the court found both insurers primarily liable. 569 F.2d at 313-15.

Transport would distinguish *Carolina*, on the basis that the lessee's insurance contract in *Carolina* contained an omnibus (permissive user) clause whereas no such clause exists in the present case. According to Transport, the contractual omnibus clause in *Carolina* provided the only basis for primary liability on the lessee's part. The district court made no specific finding on this issue. Under its ICC endorsement Transport contracted to insure Chem Haulers for any negligence of a driver operating a vehicle under Chem Haulers' Certificate of Authority. Further, the Transport policy provides coverage "to any person who would not otherwise be covered under the underlying policy except by virtue of the application of the provisions of a motor vehicle financial responsibility law or other similar law." Transport argues that absent an omnibus clause it can only be vicariously liable, and therefore has a right of indemnity against Weibley, who in turn may proceed against Watts and ultimately against Paxton. On this premise, Transport urges that holding its coverage to be excess avoids circuity of action. Our finding that Weibley is an insured under Transport's con-

tract collapses this theory, as an insurer may not be subrogated against its insured. *Carolina*, 569 F.2d at 314. Transport's attempt to distinguish *Carolina* is unpersuasive.

III.

We next turn to Mississippi law in order to determine which of the companies, or both, are primarily liable. *Cf. Carolina*, 569 F.2d at 315 (applying Georgia law).[5] Here, we are not faced with "two insurers attempting to limit their liability to excess coverage if there is other insurance." *Cf. Carolina*, 569 at 315. If such were the case we might "suffer the considerable travail" Travelers Indemnity Co. v. Chappell, 246 So.2d 498, 502 (Miss. 1971) of equitably giving effect to the exclusions in both policies. These contracts may be easily construed and enforced according to the terms employed. 246 So.2d at 510. Paxton's policy declares: "The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the company's liability under this policy shall not be reduced by the existence of such other insurance."

Transport's policy states: "If at the time of an occurrence to which this insurance applies there is any other valid and collectible insurance . . . the insurance provided by this policy with respect to that occurrence shall be excess of any other such insurance . . . ." Paxton's

5. Neither party raised or briefed the issue of whose law governs. We assume Mississippi law should apply. *See* N.K. Parrish, Inc. v. Southwest Beef, Etc., 638 F.2d 1366, 1370 n.3 (5th Cir. 1981).

policy contains no such excess or contingent clause as it pertains to basic personal and property damage insurance. Thus, Paxton's liability is primary, Transport's is excess.

This result is reached without resort to the trip lease containing the indemnity clause signed by Weibley. Therefore, it is unnecessary to inquire into the law of agency. This result harmonizes with the general rule that liability insurance provided by the vehicle owner affords primary coverage. *Travelers Indemnity*, 246 So.2d at 505, 509.

Paxton argues that under Simmons v. King, 478 F.2d 857 (5th Cir. 1973), a vehicle lessor's potential liability is to be determined under state common law, and that under Mitchell v. Eagle Motor Lines, 87 So.2d 466 (Miss. 1956) the lessee is solely liable as a matter of law for the driver's negligence. This argument has some appeal, particularly since the lease in *Mitchell* stated explicitly that the driver was the lessor's servant. However a close reading of *Mitchell* reveals that the Mississippi Supreme Court found as a matter of fact that the driver was an operator of the lessee, 87 So.2d at 467, so that the lessor had provided nothing more than the vehicle itself. 87 So.2d at 470. In contrast, there is no disputing the fact that Weibley was Watt's driver, and that Watts furnished Chem-Haulers a truck *and a driver*. While it is true that Weibley was also a statutory employee of Chem-Haulers under 49 C.F.R. 1057, *Simmons v. King, supra*, Paxton's repeated argument that Weibley was the employee of Chem-Haulers *alone*, and that he operated without Watts' permission blinks reality.

REVERSED AND REMANDED.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

No. EC 79-235-LS-O

TRANSPORT INDEMNITY COMPANY,
Plaintiff,

v.

PAXTON NATIONAL INSURANCE COMPANY,
Defendant.

MEMORANDUM OPINION

This diversity action involves a dispute between Transport Indemnity Company (Transport) and Paxton National Insurance Company (Paxton) as to which company provides liability insurance for an accident occurring in Tupelo, Mississippi, on October 24, 1978, between a pickup truck, operated by James Nichols, and a 1978 Ford tractor-trailer, owned by Edwin D. Watts and leased, with driver, to Chem-Haulers, Inc.

This court has jurisdiction of this cause pursuant to 28 U.S.C. § 1332.

Transport had a policy in effect for Chem-Haulers, Inc., and Paxton had a policy in effect for Edwin D. Watts.

At the time of the accident, the 1978 Ford tractor-trailer was under exclusive lease to Chem-Haulers, Inc., was carrying Chem-Haulers' placard, was operating under Chem-Haulers' ICC permit, and was transporting property exclusively for Chem-Haulers, under Chem-Haulers' bill of lading, over a route from Blue Mountain,

Mississippi, to Syracuse, New York, which Chem-Haulers was authorized by federal or public authority to serve.

On the other hand, Edwin J. Watts held no authorization or certificate from the ICC to transport the cargo in question to the destination in question and the 1978 Ford tractor-trailer was transporting no property for Edwin D. Watts or Watts Trucking Company. The tractor-trailer not only was not being used exclusively in the business of Edwin D. Watts or Watts Trucking Company over a route which he was authorized to serve by federal or public authority, but the same was not being used at all in the business of Edwin D. Watts or Watts Trucking Company over a route that Watts was authorized to serve.

Transport contends that Paxton's policy contained an omnibus clause and that its policy covered Chem-Haulers as a permissive user.

Paxton contends that its policy provides no coverage for this accident. First, the omnibus clause, as modified by endorsement A330, provides no coverage for permissive users. Secondly, even if the lease were in full force and effect, Paxton has no contract coverage and it would not be liable for the indemnities contained therein. Thirdly, under 49 CFR 1057, Chem-Haulers took exclusive possession and control of this tractor-trailer, checked it for safety and put it on its route hauling its cargo under its exclusive direction and control. Under 49 CFR 1057, Chem-Haulers became exclusively and solely liable for the vehicle as fully and effectively as if it owned the vehicle and the driver and this becomes Transports exclusive liability under Form BMC 90. In effect and under the law, Chem-Haulers was the owner while the vehicle was in its service.

Transport contends that its policy contains no omnibus clause. However, this is of no significance since,

under Form BMC 90, which is a part of Transport's policy, it would cover the accident in question.

Endorsement A330 of Paxton's policy provides:

> (b) Except with respect to the named insured or an employee thereof, but subject otherwise to the "Persons Insured" provision, the insurance does not cover as an insured any person or organization, or any agent or employee thereof, engaged in the business of transporting property by automobile for the named insured or for others under any of the following conditions:
>
> (1) if the bodily injury or property damage occurs while such automobile is not being used exclusively in the business of the named insured and over a route the named insured is authorized to serve by federal or public authority.

It has been stipulated, as a part of the facts of this case, that the 1978 Ford tractor-trailer in question was not being used exclusively in the business of the named insured and over a route the named insured (Edwin D. Watts) is authorized to serve by federal or public authority. It is thus clear that Paxton's policy does not apply to cover the accident in question.

Further, Paxton's policy provides:

> Exclusions.
>
> This insurance does not apply:
>
> (a) To liability assumed by the insured under any contract or agreement.

This exclusion reaches the argument of Transport that Watts, by way of the trip lease, undertook to indemnify Chem-Haulers, Inc., from any and all liability incurred

from the use of the leased vehicle. Clearly, Paxton has no liability for any contractual undertakings of its insured, Watts.

It is, therefore, the opinion of the court that Paxton's policy does not apply to the accident in question and it incurs no liability on account thereof. Said policy also excludes any liability assumed by the insured under any contract or agreement. Thus, without deciding whether the indemnity agreements are binding upon Watts, there is and can be no liability under Paxton's policy for the covenants or agreements contained in the trip lease. Its policy clearly excludes liability therefor.

The liability, if any, on account of the accident in question is and becomes the exclusive and sole respon sibility of Chem-Haulers, Inc., and Transport, under and by virtue of Form BMC 90, becomes solely liable.

It is, therefore, the finding of this court that Paxton be, and is hereby, dismissed with its costs and that Transport be, and is, declared to have the exclusive coverage for the accident in question, and it is its duty, alone, to defend any litigation arising therefrom and, to the extent of its coverage, to pay all judgments recovered against Chem-Haulers, Inc., therein.

An order in accordance with these findings will be entered by the court.

This, the 19th day of February, 1981.

/s/ L. P. SENTER, JR.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

NO. EC 79-235-LS-O

TRANSPORT INDEMNITY COMPANY,
Plaintiff,

v.

PAXTON NATIONAL INSURANCE COMPANY,
Defendant.

ORDER

Pursuant to the memorandum opinion this day filed, it is hereby ordered that the defendant, Paxton National Insurance Company, be, and it is hereby dismissed with its costs and that plaintiff, Transport Indemnity Company, be, and it is hereby declared to have the exclusive coverage for the accident in question and it is its duty, alone, to defend any litigation arising therefrom and, to the extent of its coverage, to pay all judgments recovered against Chem-Haulers, Inc., therein. The court hereby enters declaratory judgment for the defendant, Paxton National Insurance Company.

ORDERED this 19th day of February, 1981.

/s/ L. P. SENTER, JR.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

No. EC 79-235-LS-O

TRANSPORT INDEMNITY COMPANY,
Plaintiff,

v.

PAXTON NATIONAL INSURANCE COMPANY,
Defendant.

ORDER OVERRULING MOTION FOR RECONSIDERATION

This cause came on to be heard on motion of plaintiff, Transport Indemnity Company, for reconsideration of the memorandum opinion and order heretofore rendered by this court on February 19, 1981, and the court having read and considered said motion, together with the memorandum brief filed in support thereof, finds that the motion is not well taken and should be overruled.

ORDERED:

That the motion for reconsideration filed by the plaintiff herein be and the same is hereby overruled.

This, the 1st day of April, 1981.

/s/ L. P. SENTER, JR.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4120
Summary Calendar

D. C. Docket No. EC 79-235-LS-O
TRANSPORT INDEMNITY COMPANY,
Plaintiff-Appellant,

v.

PAXTON NATIONAL INSURANCE COMPANY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

Before CHARLES CLARK, RUBIN AND SAM D. JOHNSON,
Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be, and the same is hereby

remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED the defendant-appellee pay to the plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

AUGUST 31, 1981

ISSUED AS MANDATE: OCT. 16, 1981

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 81-4120
Summary Calendar

TRANSPORT INDEMNITY COMPANY,
Plaintiff-Appellant,

v.

PAXTON NATIONAL INSURANCE COMPANY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

ON PETITION FOR REHEARING
(October 5, 1981)

Before: CHARLES CLARK, RUBIN AND SAM D. JOHNSON, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:
/s/ CHARLES CLARK
United States Circuit Judge

CLERKS NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

Form 703-2

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

No. EC 79-235-LS-O

TRANSPORT INDEMNITY COMPANY,
Plaintiff,

v.

PAXTON NATIONAL INSURANCE COMPANY,
Defendant.

DECLARATORY JUDGMENT

Pursuant to the mandate issued by the United States Court of Appeals for the Fifth Circuit in this cause, it is hereby ORDERED:

That the defendant, Paxton National Insurance Company, be, and it is hereby declared to have primary coverage for the accident underlying this cause, and it is its duty to defend any litigation arising therefrom, and to the extent of its coverage, to pay all judgments recovered against Chem-Haulers, Inc., John W. Weibley and Edwin D. Watts d/b/a Watts Trucking Company, therein, and the plaintiff, Transport Indemnity Company, is hereby declared to have the excess coverage only as to Chem-Haulers, Inc. and John W. Weibley and no coverage as to Edwin D. Watts d/b/a Watts Trucking Company. Costs are to be taxed against defendant.

ORDERED this 30th day of October, 1981.

/s/ L. P. SENTER, JR.
United States District Judge

CODE OF FEDERAL REGULATIONS

49

Transportation

PARTS 1000 TO 1199

Revised as of October 1, 1980

PART 1057—LEASE AND INTERCHANGE OF VEHICLES

SUBPART A—GENERAL APPLICABILITY AND DEFINITIONS

Sec.

1057.1 Applicability.

1057.2 Definitions.

SUBPART B—LEASING REGULATIONS

1057.11 General leasing requirements.

1057.12 Written lease requirements.

SUBPART C—EXEMPTION FOR THE LEASING REGULATIONS

1057.21 General exemptions.

1057.22 Exemption for trip leasing between authorized carriers.

1057.23 Exemption for trip leasing specialized equipment.

1057.24 Exemption for trip leasing equipment used in agricultural operations.

1057.25 Recordkeeping for agricultural exemption.

SUBPART D—INTERCHANGE REGULATIONS

1057.31 Interchange of equipment.

SUBPART E—PRIVATE CARRIERS AND SHIPPERS

1057.41 Rental of equipment to private carriers and shippers.

AUTHORITY: 49 U.S.C. 304(e) and (f) and 5 U.S.C. 552, 553, and 559.

SOURCE: 44 FR 4681, Jan. 23, 1979, unless otherwise noted.

SUBPART A—GENERAL APPLICABILITY AND DEFINITIONS

§ 1057.1 APPLICABILITY.

The regulations in this part apply to the following actions by motor carriers holding permanent or temporary operating authority from the Commission to transport property:

(a) The leasing of equipment with which to perform transportation regulated by the Commission.

(b) The leasing of equipment to motor private carrier or shippers.

(c) The interchange of equipment between motor common carriers in the performance of transportation regulated by the Commission.

§ 1057.2 DEFINITIONS.

(a) *Authorized carrier*—A person or persons authorized to engage in the transportation of property as a common or contract carrier under the provisions of 49 U.S.C. 10921, 10922, 10923, 10928, 10931, or 10932.

(b) *Equipment*—A motor vehicle, straight truck, tractor, semitrailer, full trailer, any combination of these

and any other type of equipment used by authorized carriers in the transportation of property for hire.

(c) *Interchange*—The receipt of equipment by one motor common carrier of property from another such carrier, at a point which both carriers are authorized to serve, with which to continue a through movement.

(d) *Owner*—A person (1) to whom title to equipment has been issued, or (2) who, without title, has the right to exclusive use of equipment for a period longer than 30 days, or (3) who has lawful possession of equipment, registered and licensed in any State in the name of that person.

(e) *Lease*—A contract or arrangement in which the owner grants the use of equipment, with or without driver, for a specified period to an authorized carrier for use in the regulated transportation of property, in exchange for compensation.

(f) *Permanent lease*—A lease in which the authorized carrier acquires the use of equipment, with or without driver, from an owner for a period of 30 days or more.

(g) *Trip lease*—A lease in which an authorized carrier acquires the use of equipment, with or without driver, from an owner for a period of time less than 30 days.

(h) *Lessor*—In a lease, the party granting the use of equipment, with or without driver, to another.

(i) *Lessee*—In a lease, the party acquiring the use of equipment with or without driver, from another.

(j) *Sublease*—A written contract in which the lessee grants the use of leased equipment, with or without driver, to another.

(k) *Addendum*—A supplement to an existing lease which is not effective until signed by the lessor and lessee.

(l) *Private carrier*—A person, other than a motor carrier, transporting property by motor vehicle in interstate or foreign commerce when (1) the person is the owner, lessee, or bailee of the property being transported; and (2) the property is being transported for sale, lease, rent, or bailment, or to further a commercial enterprise.

(m) *Shipper*—A person who sends or receives property which is transported in interstate or foreign commerce.

(n) *Escrow fund*—Money deposited by the lessor with either a third party or the lessee to guarantee performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, and for any other purposes mutually agreed upon by the lessor and lessee.

(o) *Detention*—The holding by a consignor or consignee of a trailer, with or without power unit and driver, beyond the free time allocated for the shipment, under circumstances not attributable to the performance of the carrier.

Subpart B—Leasing Regulations

§ 1057.11 General Leasing Requirements.

Other than through the interchange of equipment as set forth in § 1057.31, and under the exemptions set forth in Subpart C of these regulations, the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions:

(a) *Lease*—There shall be a written lease granting the use of the equipment and meeting the requirements contained in § 1057.12.

(b) *Receipts for equipment*—Receipts, specifically identifying the equipment to be leased and stating the date and time of day possession is transferred, shall be given as follows:

(1) When possession of the equipment is taken by the authorized carrier, it shall give the owner of the equipment a receipt.

(2) When possession of the equipment by the authorized carrier ends, it shall obtain a receipt from the owner.

(3) Authorized representatives of the carrier and the owner may take possession of leased equipment and give and receive the receipts required under this subsection.

(c) *Identification of equipment*—The authorized carrier acquiring the use of equipment under this section shall identify the equipment as being in its service as follows:

(1) During the period of the lease, the carrier shall identify the equipment in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Vehicles). Upon termination of the lease, the authorized carrier shall remove all identification showing it as the operating carrier before giving up possession of the equipment.

(2) Unless a copy of the lease is carried on the equipment, the authorized carrier shall keep a statement with the equipment during the period of the lease certifying that the equipment is being operated by it. The statement shall also specify the name of the owner, the date and length of the lease, any restrictions in the lease relative to the commodities to be transported, and the ad-

dress at which the original lease is kept by the authorized carrier. This statement shall be prepared by the authorized carrier or its authorized representative.

(d) *Records of equipment*—The authorized carrier using equipment leased under this section shall keep records of the equipment as follows:

(1) If the equipment is being leased for periods of less than 30 days, the authorized carrier shall prepare and keep documents covering each trip for which the equipment is used in its service. These documents shall contain the name and address of the owner of the equipment, the point of origin, the time and date of departure, and the point of final destination. Also, the authorized carrier shall carry papers with the leased equipment during its operation containing this information and identifying the lading and clearly indicating that the transportation is under its responsibility. These paper shall be preserved by the authorized carrier as part of its transportation records. Trip leases which contain the information required by the provisions in this paragraph may be used and retained instead of such documents or papers.

(2) If the equipment is being leased for periods of 30 days or more, the authorized carrier shall comply with the provisions of paragraphs (d)(1) of this section, but it may keep the required information at its terminals or principal office as part of its records rather than with the leased equipment.

§ 1057.12 Written Lease Requirements.

Except as provided in the exemptions set forth in Subpart C of these regulations, the written lease required under § 1057.11(a) shall contain the following provisions:

(a) *Parties*—The lease shall be made between the authorized carrier and the owner of the equipment. The lease shall be signed by these parties or by their authorized representatives.

(b) *Duration to be specific*—The lease shall specify the time and date or the circumstances on which the lease begins and ends. These times or circumstances shall coincide with the times for the giving of receipts required by § 1057.11(b).

(c) *Minimium duration of 30 days when operated by owner*—The period for which the lease applies shall be for 30 days or more when the equipment is to be operated for the authorized carrier by the owner or an employee of the owner.

(d) *Exclusive possession and responsibilities*—(1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

(2) Provision may be made in the lease for considering the authorized carrier lessee as the owner of the equipment for the purpose of subleasing it under these regulations to other authorized carriers during the lease.

(3) When an authorized carrier of household goods leases equipment for the transportation of household goods, as defined by the Commission, the parties may provide in the lease that the provisions required by paragraph (d)(1) of this section apply only during the time

the equipment is operated by or for the authorized carrier lessee.

(e) *Compensation to be specified*—The amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease. Such lease or addendum shall be delivered to the lessor prior to the commencement of any trip in the service of the authorized carrier. An authorized representative of the lessor may accept these documents. The amount to be paid may be expressed as a percentage of gross revenue, a flat rate per mile, a variable rate depending on the direction traveled or the type of commodity transported, or by any other method of compensation mutually agreed upon by the parties to the lease. The compensation stated on the lease or in the attached addendum may apply to equipment and driver's services either separately or as a combined amount.

(f) *Items specified in lease*—The lease shall clearly specify the responsibility of each party with respect to the cost of fuel, fuel taxes, empty mileage, permits of all types, tolls, ferries, detention and accessorial services, base plates and licenses, and any unused portions of such items.

(g) *Payment period*—The lease shall specify that payment to the lessor under permanent or trip lease to the authorized carrier, shall be made within 15 days after submission of the necessary delivery documents and other paperwork concerning a trip in the service of the authorized carrier. The lease shall clearly specify the delivery documents and other paperwork that must be submitted before the lessor can receive payment.

(h) *Copies of freight bill*—Subject to the right of the authorized carrier to delete the names of shippers and con-

signees shown on the freight bill, the lease shall specify that the authorized carrier shall give a copy of the rated freight bill before or at the time of settlement to those lessors whose revenue is based on a percentage of the gross revenue for a shipment. The lease shall clearly specify the right of the lessor, regardless of method of compensation, to examine copies of the carrier's tariff.

(i) *Charge-back items*—The lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at time of payment or settlement.

(j) *Products, equipment, or services from authorized carrier*—The lease shall specify that the lessor is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease arrangement. The lease shall specify the terms of any agreement in which the lessor is a party to an equipment purchase or rental contract which gives the authorized carrier the right to make deductions from the lessor's compensation for purchase or rental payments.

(k) *Insurance*—(1) The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to Commission regulations under 49 U.S.C. 10927. The lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance. If the authorized carrier will make a charge back to the lessor for any of this insurance, the lease shall specify the amount which will be charged-back to the lessor.

(2) If the lessor purchases any insurance coverage for the operation of the leased equipment from or through

the authorized carrier, the lease shall specify that the authorized carrier will provide the lessor with a copy of each policy upon the request of the lessor. Also, where the lessor purchases such insurance in this manner, the lease shall specify that the authorized carrier will provide the lessor with a certificate of insurance for each such policy. Each certificate of insurance shall include the name of the insurer, the policy number, the effective dates of the policy, the amounts and types of coverage, the cost to the lessor for each type of coverage, and the deductible amount for each type of coverage for which the lessor may be liable.

(3) The lease shall clearly specify the conditions under which deductions for cargo or property damage may be made from the lessor's settlements. The lease shall further specify that the authorized carrier must provide the lessor with a written explanation and itemization of any deductions for cargo or property damage made from any compensation of money owed to the lessor. The written explanation and itemization must be delivered to the lessor before any deductions are made.

(l) *Escrow funds*—If escrow funds are required, the lease shall specify:

(1) The amount of any escrow fund or performance bond required to be paid by the lessor to the authorized carrier or to a third party.

(2) The specific items to which the escrow fund can be applied.

(3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transaction involv-

ing such fund. The carrier shall perform this accounting in one of he following ways:

(i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or

(ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund. This separate accounting shall be done on a monthly basis.

(4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.

(6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor or all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.

(m) *Copies of the lease.*—An original and two copies of each lease shall be signed by the parties. The authorized carrier shall keep the original and shall place a copy of the lease on the equipment during the period of the lease unless a statement as provided for in § 1057.11 (c)(2) is carried on the equipment instead. The owner of the equipment shall keep the other copy of the lease.

[44 FR 4681, Jan. 23, 1979, as amended at 45 FR 13092, Feb. 28, 1980]

CODE OF FEDERAL REGULATIONS
49
Transportation

PARTS 1000 TO 1199
Revised as of October 1, 1977

PART 1507—LEASE AND INTERCHANGE OF VEHICLES

Sec.

1057.1 Applicability.
1057.2 Definitions.
1057.3 Exemptions.
1057.4 Augmenting equipment.
1057.5 Interchange of equipment.
1057.6 Rental of equipment to private carriers and shippers.

AUTHORITY: Sec. 204, 49 Stat. 546, as amended, 49 U.S.C. 304.

SOURCE: 32 FR 20056, Dec. 20, 1967, unless otherwise noted.

§ 1057.1 APPLICABILITY.

The rules and regulations in this part apply to the augmenting of equipment by common and contract carriers of property by motor vehicle in interstate or foreign commerce subject to Part II of the Interstate Commerce Act, 49 U.S.C. 301 et seq.; to the interchange of equipment between such common carriers of property by motor vehicle, and to the lease of equipment by common and contract carriers of property by motor vehicle, with or without drivers, to private motor carriers and shippers.

§ 1057.2 DEFINITIONS.

(a) *Authorized carrier.* A person or persons authorized to engage in the transportation of property as a common or contract carrier under the provisions of section 206, 207, or 209 of the Interstate Commerce Act, 49 U.S.C. 306, 307, or 309.

(b) *Equipment.* A motor vehicle, straight truck, tractor, semitrailer, full trailer, combination tractor-and-trailer, combination straight truck and full trailer, and any other type of equipment used by authorized carriers in the transporation of property for hire.

(c) *Interchange of equipment.* The physical exchange of equipment between motor common carriers or the receipt by one such carrier of equipment from another such carrier, in furtherance of a thorough movement of traffic, at a point or points which such carriers are authorized to serve.

(d) *Regular employee.* A person not merely an agent but regularly in exclusive full-time employment.

(e) *Agent.* A person duly authorized to act for and on behalf of an authorized carrier.

(f) *Owner.* A person (1) to whom title to equipment has been issued, or (2) who as lessee, has the right to exclusive use of equipment for a period longer than 30 days, or (3) who has lawful possession of equipment and has the same registered and licensed in any State or States or the District of Columbia in his or its name.

(g) *Private carrier.* A person as defined in § 203(a)(17) of the Interstate Commerce Act.

(h) *Shipper.* A person who consigns or receives property which is transported in interstate or foreign commerce.

§ 1057.3 EXEMPTIONS.

The provisions of § 1057.4, except paragraphs (c) and (d), relative to inspection and identification of equipment, shall not apply:

(a) *Equipment used in the direction of a point which lessor is authorized to serve.* To equipment owned or held under a lease of 30 days or more by an authorized carrier and regularly used by it in the service authorized, and leased by it to another authorized carrier for transportation in the direction of a point which lessor is authorized to serve: *Provided,* That the two carriers have first agreed in writing that control and responsibility for the operation of the equipment shall be that of the lessee from the time the equipment passes the inspection required to be made by lessee or its representative under § 1057.4(c) until such time as the lessor or its representative shall give to the lessee or its representative a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is retaken or until such time as the required inspection is completed

by another authorized carrier taking possession of the equipment in an interchange of equipment where such use is contemplated, such writing to be signed by the parties or their duly authorized regular employees or agents, and a copy thereof carried in the equipment while the equipment is in the possession of the lessee.

(b) *Rail or express vehicles.* To equipment utilized wholly or in part in the transportation of railway express traffic, or in substituted motor-for-rail transportation of railroad freight moving between points that are railroad stations on railroad billing.

(c) *Commercial zone operations.* To equipment utilized in transportation performed solely and exclusively within any municipality, contiguous municipalities, or commercial zone, as defined by the Commission.

(d) *Vehicles without drivers from rental companies.* To the lease of equipment without drivers by an authorized carrier from an individual, co-partnership, or corporation, whose principal business is the leasing of equipment without drivers for compensation.

(e) *Non-powered equipment.* To equipment other than a power unit, provided that such equipment is not drawn by a power unit leased from the lessor of such equipment.

§ 1057.4 AUGMENTING EQUIPMENT.

Other than equipment exchanged between motor common carriers in interchange service as defined in § 1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:

(1) *Parties.* Shall be made between the authorized carrier and the owner of the equipment.

(2) *Written contract required.* Shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them in the execution of contracts, leases, or other arrangements.

(3) *Minimum duration of 30 days when operated by lessor.* Shall specify the period for which it applies, which shall be not less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employee of the owner; excepting:

(i) *Equipment used in agricultural or perishable operations.* That subject to the proviso in (*c*) of this subdivision such 30-day minimum period shall not apply to equipment, with driver:

(*a*) Where the motor vehicle so to be used is that of a farmer or a cooperative association or a federation of cooperative associations, as specified in section 203 (b) (4a) or (5) of the Interstate Commerce Act, or is that of a private carrier of property by motor vehicle as defined in section 203(a)(17) of the Act and is used regularly in the transportation of property of a character embraced within section 203(b)(6) of the Act or perishable products manufactured from perishable property of a character embraced within section 203(b)(6), and such motor vehicle is to be used by the motor carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(*b*) Where the motor vehicle so to be used in one which has completed a movement covered by section 203(b)(6) of the Act and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; and

(*c*) Provided, in either instance that prior to the execution of the lease, the authorized carrier receives and retains a statement signed by the owner of the equipment, or someone duly authorized to sign for the owner, authorizing the driver to lease the equipment for the movement or movements contemplated by the lease, certifying that the equipment so leased meets the qualifications enumerated in (a) or (b) of this subsection, and specifying the origin, destination, and the time of the beginning and ending of the last movement which brought the equipment within the purview of this subsection.

(ii) *Automobile and tank truck carriers.* That such 30-day minimum period shall not apply to equipment owned or held under lawful lease by an authorized automobile carrier or tank truck carrier and used in the transportation of motor vehicles or commodities in bulk, respectively, when leased or subleased to other such authorized carriers.

(iii) *Ice and snow control purposes.* That such 30-day minimum period shall not apply to dump equipment leased or subleased for use in transporting salt and calcium chloride, in bulk, for ice and snow control purposes, during the period from November 1 to April 30, both inclusive, of each year.

(4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the

equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:

(i) *Lessee may be considered as owner.* Provision may be made therein for considering the lessee as the owner for the purpose of subleasing under these rules to other authorized carriers during such duration.

(ii) *Household goods, carrier; intermittent operations under long-term lease.* When entered into by authorized carriers of household goods, for the transportation of household goods, as defined by the Commission, such provisions need only apply during the period the equipment is operated by or for the authorized carrier, lessee.

(5) *Compensation to be specified.* Shall specify the compensation to be paid by the lessee for the rental of the leased equipment. Subject to the exemption provisions of paragraph (a)(3)(i) of § 1057.4, and except to the extent that amounts paid for the same operations to the lessor in the form of specific fuel cost adjustments pursuant to the provisions of the Interstate Commerce Commission's Special Permission Order No. 74-2525, entered February 7, 1974, and modified February 8, 1974, or designated surcharge procedures, compensation paid by the lessee shall, on and after February 15, 1974, be increased by an amount equal to the increased costs of fuel purchased at lawful prices and borne by the lessor, provided the lessor is responsible for supplying the fuel consumed in operations conducted under the lease. The amount of such increase shall be; (i) Added to the compensation paid the lessor for the leased equipment; and (ii) computed by: (A) Subtracting from the lawful prices actually paid or to be paid by the lessor (and authenticated by him by presentation to the lessee of valid receipts for fuel actually

purchased) and consumed in the operation for which the equipment is leased, the lawful price paid by the lessor of the same type of fuel in effect on May 15, 1973, provided fuel was purchased by him on that date and (B) reducing such difference by any amounts as are paid for the same operations to the lessor in the form of specific fuel-cost adjustments resulting from increases in the carriers' rates or charges obtained subsequent to May 15, 1973. In the event fuel was not purchased by the lessor on May 15, 1973, the purchase date to be used in lieu thereof for the computations required in (ii) above shall be: (a) The date of the purchase of fuel last preceding May 15, 1973; or, (b) if the equipment was first leased on a date subsequent to May 15, 1973, the date of the lessor's first purchase of fuel for operations conducted under a leasing arrangement. Subject to the right of the lessee to delete confidential business information shown thereon which may be used to the detriment or prejudice of the shipper or consignee, the contract shall provide that the lessee, on demand of a lessor whose compensation under such lease is based upon a percentage or division of revenue, will, at the lessee's option, either provide the lessor a copy of each extended freight bill covering the transportation involved, or make reasonable arrangements for the lessor to inspect the same. The contract also shall specify, regardless of the method or manner in which compensation of the lessor is determined, the terms and conditions as to when payment of compensation is due and payable to the lessor and the circumstances, if any, when such compensation, in whole or in part, will be withheld.

(6) *Duration to be specific.* Shall specify the time and date or the circumstances on which the contract, lease, or other arrangement begins, and the time or the circumstances on which it ends. The duration of the contract, lease or other arrangement shall coincide with

the time for the giving of receipts for the equipment as required by paragraph (b) of this section; and

(7) *Copies of lease and their distribution; copy to be carried on vehicle.* Shall be executed in triplicate; the original shall be retained by the authorized carrier in whose service the equipment is to be operated, one copy shall be retained by the owner of the equipment, one copy shall be carried on the equipment specified therein during the entire period of the contract, lease, or other arrangement, unless a certificate as provided in paragraph (d)(2) of this section is carried in lieu thereof.

(b) *Receipts for equipment to be specific.* When possession of the equipment is taken by the authorized carrier or its regular employee or agent duly authorized to act for it, said carrier, employee or agent shall give to the owner of the equipment, or the owner's employee or agent a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is taken; and when the possession by the authorized carrier ends; it or its employee or agent shall obtain from the owner of the equipment, or its regular employee or agent duly authorized to act for it, a receipt specifically identifying the equipment and stating therein the date and the time of day possession thereof is taken.

(c) *Safety inspection of equipment by the authorized carrier.* It shall be the duty of the authorized carrier, before taking possession of equipment, to inspect the same or to have the same inspected by a person who is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection as a representative of the carrier in order to insure that the said equipment complies with the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation. However, where carriers

leasing equipment are commonly controlled and jointly maintain and administer a uniform safety program, no such inspection at the point of lease is required; *Provided*, That both carriers remain under common control and the equipment be inspected within the 24 hour period immediately preceding the time of augmentation and found to meet the requirements of the Motor Carrier Safety Regulations of the Department of Transportation. The person making the inspection shall certify the results thereof on a report in the form hereinafter set forth, which report shall be retained and preserved by the authorized carrier, and if his inspection discloses that the equipment does not comply with the requirements of the said safety regulations, possession thereof shall not be taken. When such an inspection has been made, the authorized carrier or an officer or partner thereof, or a safety director or other supervisory employee responsible for safety compliance, shall certify on the inspection report that the person who made the inspection, whether an employee or person other than an employee, is competent and qualified to make such inspection and has been duly authorized to do so by such carrier as its representative. When equipment other than a power unit is leased, a form of report applicable to such equipment may be used.

REPORT OF VEHICLE INSPECTION

Description of vehicle:

Make ..... Year .....

Model ..... Serial No .....

Type: Tractor ..... Trailer .....

Semitrailer .....

License plate: No ..... State .....

Owner's name .....

Name of authorized carrier .....

Indicate in the proper column the result of the inspection of each item listed:

Item	Not defective	Defective	Description of defect
Body			
Brakes			
Cooling system			
Drive line			
Emergency equipment			
Engine			
Exhaust			
Fuel system			
Glass			
Horn			
Leaks			
Lights (state which)			
Reflectors			
Speedometer			
Springs			
Steering			
Tires			
Wheels			
Windshield wiper			

Any other items requiring attention .....

.....

I hereby certify that on the ..... day of .....
I carefully inspected the equipmnt described above and that this is a true and correct report of the result of such inspection.

(Signature of person making inspection)

I hereby certify that on the date stated above the person who made the inspection covered by this report was competent and qualified to make such inspection and was duly authorized to make such inspection as a representative of: .....

(Names of authorized carrier)

(Signature of carrier, partner, officer, safety director, or other supervisory employee responsible for safety compliance.)

Date .....

(d) *Identification of equipment as that of the authorized carrier.* The authorized carrier acquiring the use of equipment under this rule shall properly and correctly identify such equipment during the period of the lease, contract, or other arrangement in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Vehicles). If a removable device is used to identify the acquiring authorized carrier as the operating carrier, such device shall be on durable material such as wood, plastic, or metal, and bear a serial number in the acquiring authorized carrier's own series so as to keep proper record of each of the identification devices in use.

(1) *Identification to be removed when lease terminated.* The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment.

(2) *Certified statement may be carried on vehicle in lieu of lease.* Unless a copy of the lease, contract or other arrangement is carried on the equipment, as provided in paragraph (a)(7) of this section, the authorized carrier or its regular employee or agent shall prepare a statement certifying that the equipment is being operated by it, which shall specify the name of the owner, the date of the lease, contract or other arrangement, the period thereof, any restrictions therein relative to the commodities to be transported, and the location of the premises where the original of the lease contract or other arrangement is kept by the authorized carrier, which certificate shall be carried with the equipment at all times during the entire period of the lease, contract, or other arrangement.

(e) *Driver of equipment to be in compliance with safety regulations.* Before any person other than a regular employee of the authorized carrier is assigned to drive equipment operated under this part, it shall be the duty of the authorized carrier to make certain that such driver is familiar with, and that his employment as a driver will not result in, violation of any provision of the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation.

(f) *Record of equipment to be maintained; shipping documents to identify the authorized carrier.* The authorized carrier utilizing equipment operated under this part for periods of less than 30 days shall prepare and keep a manifest or other documents covering each trip for which the equipment is used in its service, containing the name and address of the owner of such equipment; point of origin, the time and date of departure, the point of final destination, and the authorized carrier's serial number of any identification device affixed to the equipment. During the time that equipment subject to this part is operated there shall be carried with the equipment, bills of lading, waybills, freight bills, manifests, or other papers identifying the lading, and containing the foregoing information, which shall clearly indicate that the transportation of the property carried is under the responsibility of the authorized carrier, which papers shall be preserved by the authorized carrier. This section shall also apply with respect to vehicles leased for periods of 30 days or more unless the required information is kept at a terminal or office as a part of the records of the authorized carrier.

[5 U.S.C. 553 and 559]

[32 FR 20056, Dec. 20, 1967, as amended at 33 FR 2848, Feb. 10, 1968; 39 FR 6525, Feb. 20, 1974; 41 FR 10228, Mar. 10, 1976; 42 FR 39667, Aug. 5, 1977]

§ 1057.5 Interchange of Equipment

Authorized common carriers may by contract, lease, or other arrangement, interchange any equipment defined in § 1057.2 with one or more other such common carriers, or one of such carriers may receive from another such carrier, any of such equipment, in connection with any through movement of traffic, under the following conditions:

(a) *Interchange agreement to be specific.* The contract, lease, or other arrangement providing for interchange shall specifically describe the equipment to be interchange; the specific points of interchange; the use to be made of the equipment, and the consideration for such use; and shall be signed by the parties to the contract, lease, or other arrangement, or their regular employees or agents duly authorized to act for them, in the execution of such contracts, leases, or other arrangements.

(b) *Operating authority of carriers participating in interchange.* The certificates of public convenience and necessity held by the carriers participating in the interchange arrangement must authorize the transportation of the commodities proposed to be transported in the through movement and service from and to the point where the physical interchange occurs.

(c) *Through bills of lading required.* The traffic transported in interchange service must move on through bills of lading issued by the originating carrier, and the rates charged and revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates.

(d) *Safety inspection of equipment.* It shall be the duty of the carrier acquiring the use of equipment in interchange to inspect such equipment, or to have it inspected in the manner provided in § 1057.4(c). Equipment which does not meet the requirements of that paragraph shall not be operated in the respective services of the interchange carriers until the defects have been corrected. Where carriers interchanging equipment for a through movement of traffic are commonly controlled and jointly maintain and administer a uniform safety program, no such inspection at the point of interchange is required; *Provided,* That the equipment interchanged has been so inspected immediately prior to the start of the movement in which the interchange occurs and found to meet the requirements of § 1057.4(c).

(e) *Identification of equipment as that of the operating carrier.* Authorized carriers operating power units in interchange service shall identify such equipment in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Motor Carrier Vehicles)....

Opposition

NO. 81-1229

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PAXTON NATIONAL INSURANCE COMPANY,
Petitioner

versus

TRANSPORT INDEMNITY COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPORTS OF OPINIONS

The opinion of the court of appeals is reported at 657 F.2d 657 (5th Cir. 1981).

SUMMARY OF ARGUMENT

The petition should not be granted. The decision of the court of appeals is not in conflict with the decision of another federal court of appeals and is consistent with the reasoning of other federal courts of appeal and with the analysis applied by this Court in a prior motor carrier case. The "control and responsibility" provisions of the Interstate Commerce Act and regulations, requiring that a certificated carrier-lessee have control and responsibility for the operation of leased equipment, do not establish an exclusive employer-employee relationship between the lessee and the driver furnished with the equipment by its owner. Neither the Act nor its regulations dictate the status of a driver as an insured under any policy of insurance, and the issue of priority of coverage is to be determined on the facts of the particular case, including the interpretation of the applicable insurance contracts.

All of the federal courts of appeals which have had occasion to address the issue have held that a driver may be considered the employee of the owner-lessor, ICC regulations notwithstanding. Where the driver is a paid employee of the owner-lessor at the time of an accident and the driver is a permissive user of the owner's equipment, a policy of insurance issued to the owner and containing an omnibus clause insures the risk that the owner's permissive user might incur liability. The insurer of the owner cannot disavow its primary insurer status on the theory that public policy demands that this be pushed off onto the insurer of the certificated carrier. Neither the Act nor the regulations make the insurer of the lessee-carrier primary as a matter of law.

ARGUMENT

There are no special or important reasons for granting the petition herein. The decision of the court of appeals rendered in this case is not in conflict with the decision of another federal court of appeals on the issues presented. On the contrary, the instant decision by the appellate court is consistent with the reasoning of other federal courts of appeal which have had occasion to address the question. Furthermore, the instant determination by the court of appeals, to the extent it involves a question of federal law, is consistent with the analysis applied by this Court in a prior case, and no important question of federal law is raised in the petition which remains to be settled by this Court.

The argument advanced by petitioner reflects a fundamental misunderstanding of the purpose and effect of pertinent provisions of the Interstate Commerce Act 1/(the Act) and Interstate Commerce Commission (ICC) regulations 2/issued thereunder as they may relate to the question of the priority of insurance coverage afforded by respective policies of insurance issued to a certificated carrier-lessee and to an owner-lessor of a motor vehicle used in interstate commerce. As reiterated by the Fifth Circuit in its determination of the instant dispute, neither the Act nor the ICC regulations have the effect of imposing primary coverage on the insurer of the regulated carrier as a matter of law.

This view was enunciated by the Fifth Circuit in *Carolina Cas. Ins. Co. v. Underwriters Ins. Co.*, 569 F.2d 304 (5th Cir. 1978), where it rejected the notion that the "Endorsement for

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1/ Section 204(e) of the Act, 49 U.S.C. §304(e), recodified at 49 U.S.C. §11107(a).

2/ Section 1057.4(a) (4), 49 C. F. R. §1057.4(a) (4), revised at 49 C. F. R. §1057.12(d) (1).

Motor Carrier Policies of Insurance for Automobile Bodily Injury and Property Damage Liability under Section 215 of the Interstate Commerce Act" 3/ (ICC Endorsement) 4/ makes insurance coverage primary in all circumstances and for all purposes as a matter of law. The court explained:

> The purpose of §215 of the Interstate Commerce Act and regulations is to assure to members of the public and shippers that a certificated carrier has independent financial responsibility, with the dollar limit prescribed, to pay for losses created by its carrier operations.
>
> 569 F.2d at 312.

The Fifth Circuit observed that where construction of an insurance policy is not required to protect the public, ICC considerations are not determinative; that ICC regulations may not be read into a policy to impose liability upon an insurer in contravention of the precise terms of the policy; and, that the Interstate Commerce Act and regulations are not designed to excuse a party from liability which he might otherwise have. 569 F.2d at 312-313 (citing cases).

The court of appeals concluded that even though the policy issued to a certificated carrier contains an ICC endorsement, the endorsement does not make the carrier the primary insurer as a matter of law. Where the driver is a paid employee of the owner-lessor at the time of an accident and the leasing agreement grants the driver permissive use of the owner's equipment, a policy of insurance issued to the owner and

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3/ Section 215 of the Act, 49 U.S.C. §315 (1976), recodified at 49 U.S.C. §10927.

4/ Form BMC 90, an endorsement to the carrier's policy assuring compliance with the foregoing provisions of the Act.

containing an omnibus clause insures the risk that the owner's permissive user might incur liability. The insurer of the owner cannot disavow its primary insurer status on the theory that public policy demands that this be pushed off onto the insurer of the certificated carrier.

> ICC policy factors are frequently determinative where protection of a member of the public or a shipper is at stake, but these factors cannot be invoked by another insurance company which has contracted to insure a specific risk and which needs no equivalent protection.
>
> 569 F.2d at 313.

The position of the Fifth Circuit is consistent and in harmony with the position taken by federal courts of appeals for the Third Circuit, ***Allstate Ins. Co. v. Liberty Mutual Ins. Co.***, 368 F.2d 121 (3rd Cir. 1966), ***Walter v. Dunlap***, 368 F.2d 118 (3rd Cir. 1966), ***Carolina Cas. Ins. Co. v. Ins. Co. of N. America***, 595 F.2d 128 (3rd Cir. 1979); the Seventh Circuit, ***Pacific Intermountain Express Co. v. Liberty Mutual Ins. Co.***, 359 F.2d 735 (7th Cir. 1966); the Eighth Circuit, ***Wellman v. Liberty Mutual Ins. Co.***, 496 F.2d 131 (8th Cir. 1974); and the District of Columbia Circuit, ***National Mutual Ins. Co. v. Liberty Mutual Ins. Co.***, 196 F.2d 597 (D. C. Cir.), ***cert. denied***, 344 U.S. 819 (1952).

Even the Tenth Circuit, apparently cited by petitioner as the sole federal appeals court supporting petitioner's theory that the "exclusive control and responsibility" requirement of the ICC regulations would delimit the owner's relationship with his equipment and driver and thereby establish an exclusive master-servant relationship between the driver and the certificated carrier, [5/] subsequently has held, ICC regu-

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5/ *Argonaut Ins. Co. v. National Indemnity Co.*, 435 F.2d 718 (10th Cir. 1971), *Hagans v. Glen Falls Ins. Co.*, 465 F.2d 1249 (10th Cir. 1972), Pet. for Cert. at 7, note 5.

lations notwithstanding, that the driver of the leased vehicle may remain an employee of the owner and thus a permissive user under the owner's policy of insurance. *See Carolina Cas. Ins. Co. v. Transport Indemnity Co.*, 488 F.2d 790 (10th Cir. 1973).

Thus, a review of the reported federal courts of appeals decisions does not reveal that the "exclusive control and responsibility" provisions of the Act and regulations establish as a matter of law an exclusive employer-employee relationship between the regulated lessee-carrier and the driver furnished by the owner with the leased vehicle. All of the decisions indicate that the driver's status as an employee for priority of insurance purposes is a factual determination, that his status as an insured under a given policy of insurance is to be determined by the terms of the policies involved, and that neither of these determinations is dictated by public policy considerations underlying the Act and the regulations.

Although the driver of a vehicle leased to a common carrier may be considered the lessee's "statutory" employee under such circumstances for purposes of establishing vicarious liability to a member of the public, the ICC regulatory scheme is not conclusive as to the actual status of persons who are covered by insurance contracts, specifically whether one is an employee of an insured for insurance purposes. The parties' agreed characterization of the legal responsibility of one or the other under the terms of a lease agreement is not prohibited by any regulation of the ICC. It has been established by this Court that parties responsible for the authorized operation of a motor vehicle may apportion liability among themselves by written contract and by principles of indemnity where the lessee's basic responsibility to the public is assured.

Although not directly applicable on its facts to the instant case, this Court's decision in *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975),

employs an analysis which supports the conclusion that neither the Interstate Commerce Act, the regulations issued thereunder, nor any implied notions of public policy require that the carrier-lessee's insurance coverage be considered primary as a matter of law. The opinion in *Brada Miller* supports the argument that public policy does not dictate that either the lessee's coverage or the lessor's coverage should be held primary or excess solely by virtue of the ICC regulatory scheme, but rather that this may be left entirely to private contractual arrangements.

At issue in *Brada Miller* was a lease agreement which contained an indemnification clause whereby the owner-lessor agreed to indemnify the carrier-lessee for claims arising out of the negligence of the lessor for its employees. The lessee attempted to enforce the indemnification agreement, and the lessor argued that the clause was unenforceable as against public policy because the "control and responsibility" regulations placed full responsibility on the carrier-lessee. This is similar to petitioner's implicit argument in the instant case that because of these same regulations the carrier-lessee's insurance carrier must be held primary as a matter of law.

This Court reviewed the background of the rulemaking proceedings which resulted in the issuance of the "control and responsibility" regulations, noting that the ICC was concerned ". . . with that ultimate control in the lessee that makes and keeps it responsible to the public, the shipper, and the Commission." 423 U.S. at 39. The ICC has not proscribed an arrangement which places ultimate responsibility on the party responsible in fact, ". . . so long as the lessee does not absolve itself from the duties to the public and to shippers imposed upon it by the Commission's regulations." *Id.* at 40. The Court concluded with the observation that, "[a]lthough one party is required by law to have control and responsibility for conditions of the vehicle, and to bear the consequences of any negligence, the party responsible in law to

the injured or damaged person may seek indemnity from the party responsible in fact." *Id.* at 40.

The Court held that the indemnity provision was not prohibited on public policy grounds by the "control and responsibility" requirement of the regulations, requiring that the lessee have control and responsibility for the operation of leased equipment, since the indemnity clause of the lease, which had not affected the lessee's basic responsibility to the public, but only the relationship between the lessee and lessor, did not, in and of itself, offend or conflict with the ICC regulations.

If petitioner's position is tenable - - that the lessee and its insurance carrier are always primarily responsible - - it would seem to follow that the lessee or its insurance carrier could not seek indemnity from the party responsible in fact. Such a result would be inconsistent with the view of this Court expressed in *Brada Miller.*

Of even more significance to the instant case is the Court's observation in *Brada Miller:* "The regulations . . . do not require the lessee itself to operate the equipment; the lessor may perform that task by furnishing the driver with the equipment." 423 U.S. at 36.

> The lessor, as a general rule, is the party more familiar with the equipment it leases and with the experience, ability and record of the driver it furnishes. An agreement placing the ultimate financial responsibility upon the negligent lessor thus may have a tendency to provide greater protection to the public and to shippers."
>
> 423 U.S. at 41.

It is apparent that the public policy and safety considerations underlying the pertinent portions of the Act and regu-

lations, as analyzed by this Court, do not dictate an exclusive employer-employee relationship between the regulated lessee-carrier and the driver furnished by the owner with the leased vehicle.

Petitioner asserts that the court of appeals improperly substituted its own finding with respect to the employment status of the driver in this case when, in petitioner's judgment, the district court's determination rested upon evidence, was consistent with federal and common law doctrines, and was not clearly erroneous. Petitioner overlooks the fact that the district court made no finding of fact in this regard whatsoever. More particularly, the district court failed to make any finding with reference to whether Weibley, the driver, remained an "employee" of petitioner's insured within the contemplation of the exclusion contained in the A330 truckmen's endorsement, the exclusion upon which petitioner relied in the district court. The district court's memorandum opinion is devoid of any discussion concerning Weibley's employment status. Pet. for Cert., A8 - All; ***see, e.g., Carolina Cas. Ins. Co. v. Ins. Co. of N. America, supra,*** at 141–142, notes 48–49.

The record reviewed by the court of appeals reflects that Weibley was Watt's driver, that Watts agreed to furnish a truck and driver, that Weibley was the regular employee of Watts, that Weibley executed the subject trip lease on Watts' behalf, and that it was Watts' responsibility to pay the driver and to provide workmen's compensation coverage for him. It is apparent that the finding of ultimate fact or conclusion of law made by the district court was not grounded upon requisite subsidiary facts, and the conclusion of the court of appeals that "Paxton's repeated argument that Weibley was the employee of Chem-Haulers ***alone***, and that he operated without Watts' permission blinks reality" 6/ is borne out by the record

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6/ Pet. for Cert., A7; 657 F.2d at 660.

and was reached within the recognized parameters of appellate review.

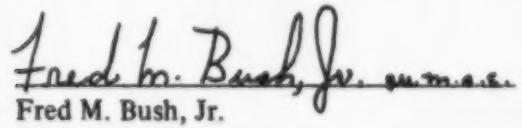
Even more fundamentally, what petitioner fails to note is that this is an insurance case, not a tort case. The issue is whether the driver is an insured under petitioner's policy of insurance - - leading to a determination of which insurer's coverage should be primary - - not whether the owner of the leased vehicle might ultimately be held vicariously liable for the negligence of the operator. Agency is not material here. While a driver's "statutory" employee status may create vicarious liability on the part of a carrier-lessee, *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973), the status of the driver as an additional insured under a policy of insurance issued to the lessor of a motor vehicle is not determined by the Act or ICC regulations.

Petitioner's reliance on the Mississippi court's decision in *Mitchell v. Eagle Motor Lines*, 87 So. 2d 466 (Miss. 1956), is misplaced. Whether an employee is acting within the scope of his employment so as to impose liability on the employer is not the issue. The issue is whether the operator is an "employee" of a named insured under the terms of the insurance contract. Whether or not Watts might be vicariously liable for the acts of Weibley in operating the insured vehicle is not dispositive of Weibley's status as an additional insured under the Paxton policy. The *Mitchell* case was exclusively concerned with the issue of vicarious liability, did not involve the interpretation of insurance contracts, and is wholly inapposite to the instant case.

CONCLUSION

Based upon the foregoing, respondent respectfully submits there are no special or important reasons for granting the petition. All of the federal courts of appeals which have had occasion to address the question have recognized that the "exclusive control and responsibility" provisions of the Interstate Commerce Act and ICC regulations governing the leasing and use of equipment by interstate motor carriers do not establish an exclusive employer-employee relationship between the certificated carrier-lessee and the driver furnished by the owner with the leased vehicle and do not impose primary insurance coverage on the insurer of the carrier-lessee as a matter of law and as dictated by public policy. This reasoning, followed by the court of appeals in this case, is consistent with the analysis applied by this Court in a prior case. Accordingly, the petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am this date serving three (3) true and correct copies of Brief for Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, upon the persons and in the manner indicated below, said persons being counsel for all parties required to be served.

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Dated this 3rd day of February, 1982.

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